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IN THE

Supreme Court of the United States

October Term, 1990

DR. IRVING RUST, et al., *Petitioners*,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

THE STATE OF NEW YORK, et al., *Petitioners*,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF UNITED STATES SENATORS GORDON J. HUMPHREY (R-NH), STEVE SYMMS (R-ID), AND DAN COATS (R-IN) AND UNITED STATES REPRESENTATIVES THOMAS J. BLILEY, JR. (R-VA), CHRISTOPHER H. SMITH (R-NJ), AND ALAN B. MOLLOHAN (D-WV), ET AL. IN SUPPORT OF RESPONDENT

[Additional Amici Continued on Inside Cover]

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Do the DHHS regulations which require Title X funded family planning services to be separate from abortion services provided by a grant recipient comply with the intent of Congress in enacting Title X with its provision that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning?"

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INTEREST OF THE AMICI[1]

Because the regulations at issue herein were promulgated under authority of legislation enacted by the Congress of the United States of America, your amici—members of that body—have an interest in ensuring that the Department of Health and Human Services rightly interprets and administers the underlying legislation, Title X of the Public Health Service Act, 42 U.S.C. §300 et seq. (1982 & West Supp. 1990). As members of Congress, your amici also have special insight into the issue of the congressional intent underlying Title X, which is set forth herein. It is this legislative intent to which the Department of Health and Human Services (DHHS) must conform its regulations, which it has done.

INTRODUCTION

When Congress enacted Title X, opposition to abortion was of such strength that Title X could only be enacted with the inclusion of Section 1008. Section 1008 was designed to allay fears that Title X funds would be used to promote abortion in any way. With Section 1008 in place, Title X was enacted with broad bipartisan support.

Over the years, members of Congress have inquired concerning reports that Title X funds were being used to counsel or refer for abortions. They were assured by congressional leaders and by DHHS officials that this was not permitted under Title X. As a result, amendments prohibiting such activity were declared to be unnecessary and defeated. Although such subsequent congressional action speaks nothing to the intent underlying the original enactment of Section 1008, it does highlight the fact that questions about the use of Title X funds for abortion-related activity have been longstanding.

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[1]This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

Finally, the DHHS has responded to this concern with new regulations. These make clear that Federal funding for preventive family planning activity, which is approved under Title X, must be completely separate from abortion-related activity, the Federal funding of which is barred by Section 1008. The regulations merely guarantee a situation which congressional leaders insisted was in effect when members of Congress sought to add Title X amendments barring abortion counseling and referral, namely, that no such activity is funded under Title X because it is not permitted. These regulations will assure that the intent of Congress in enacting Title X with Section 1008 will be implemented. They will make certain that the public does not perceive that Congress is promoting or encouraging abortion in any way by use of Federal funds.

Your amici include many of the numerous members of Congress who filed comments with the DHHS applauding the new regulations as fulfilling the congressional intent underlying Section 1008. *Unless and until Congress acts to alter Section 1008*, it stands, and the integrity of Title X can best be protected by these regulations.

SUMMARY OF THE ARGUMENT

Crucial to implementing the congressional intent underlying Title X are the requirements of the regulations which prohibit abortion counseling, referral, or advocacy and those which require a physical, publicly-perceivable separation between Title X-funded, preventive family planning and any abortion-related activities in which the grantee may engage. Section I, *infra*, demonstrates how the prohibition on abortion counseling and referral is perfectly consistent with Section 1008 and Title X in general. Section II demonstrates that, in any event, the regulations are based on a permissible construction of the statute. Section III demonstrates that the requirement of the regulation requiring physical separation between Title X-funded, preventive family planning activities and abortion-related activities is essential to fulfilling the Congressional intent in enacting Section 1008 and is entirely reasonable.

ARGUMENT

In determining the congressional intent underlying a statute, this Court first examines the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). The plain language of the statute compels the conclusion that Congress intended to exclude abortion counseling, referral, or advocacy (except in emergency situations) from Title X programs.

However, even if the enabling statute were considered ambiguous, the agency may still proscribe the funding of such abortion-promoting activity if the agency's construction is a "permissible" one under the statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-83 (1984) (footnotes omitted).

In determining what is permissible, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question

initially had arisen in judicial proceedings." *Id.* at 843 n.11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency charged with administering the statute. *Id.* at 844.

I. The Plain Language of Section 1008 Reveals that Congress Did Not Intend Title X Programs to Encompass Abortion Counseling, Referral, or Advocacy.

The statutory provision, Section 1008, which authorizes the DHHS regulations, was adopted by Congress as follows:

> **Prohibition of Abortion**
> **None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.**

42 U.S.C. §300a-6.

In interpreting the meaning of this provision, this Court looks at "the particular statutory language at issue" in the context of "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). As will be seen, Section 1008 standing alone and in context supports the DHHS regulations.

By contrast, the assertion of Petitioners that Section 1008 applies only to the physical performance of abortions is untenable. Brief of Petitioners New York et al. at 12. Petitioners read the provision of Section 1008 as if it actually says, "None of the funds appropriated under this title shall be used in programs which *perform abortions* to control the number and spacing of children for its patients." Of course, that is not how the statute reads. Alternatively, it is urged that "section 1008 prohibits the expenditure of Title funds only for 'abortion,' not 'abortion counseling' or 'abortion referral.' " Brief Amici Curiae of Schroeder et al. at 4, herein. But Section 1008 does not read, as this interpretation would require, "None of the funds appropriated under this title shall be used to perform or fund *abortion* as a method of birth control." Rather, the prohibition applies in

any *program* where abortion is presented as an appropriate method to control the number and spacing of one's children. This encompasses abortion counseling and referral. There is no need for these terms to be expressly used because of the way the prohibition is formulated, and their absence is irrelevant and meaningless.

The Petitioners rely greatly on the notion that the term "method" denotes a procedure. *Id.* Clearly the notion of "methods" employed in a Title X program for family planning is broader than those in which the physical performance of a procedure occurs. This is made clear by a careful examination of the terminology of Section 1008 both alone and in context with other passages.

Standing alone, Section 1008 supports the DHHS regulations. In common usage, a "method" is "a procedure or process for attaining an object" or "a way, technique, or process of or for doing something." *Webster's Ninth New Collegiate Dictionary* (1985). "Family planning" means "planning intended to determine the number and spacing of one's children through effective methods of birth control." *Id.* When one plans to determine the number and spacing of one's children, he or she selects an effective procedure or process for controlling birth. A Title X program is intended to give information on the various effective methods for controlling the number and spacing of one's children. With some methods, the program may perform an action other than mere communication. For example, employees of the program may insert an IUD. However, in providing other methods, such as barrier or hormonal methods, a mere provision of needed items or writing a prescription may suffice. In providing these methods, the Title X program performs no "procedure" on the patient. And in providing the method of natural (rhythm) birth control (required by Title X to be provided, 42 U.S.C. §300(a)) the Title X program need not provide even supplies or a prescription. Only communication of information is provided.

Thus, it is disingenuous for Petitioners to insist that when a

Title X program provides someone with a "method" of birth control it must perform a procedure upon them. Providing information about abortion, by counseling or referring for abortion, is every bit as much the provision of a "method of birth control" as providing information about a rhythm method of birth control. The key is whether the procedure or method is presented by the Title X program as an appropriate method of controlling the number and spacing of one's children.

Therefore, while Title X may approve and fund the provision of a number of methods of birth control, by the provision of either information or some procedure, Section 1008 prohibits Title X grantees from providing, by either information or actual procedure, one method of controlling the number and spacing of one's children — abortion.

Placed in the larger context of Title X, Section 1008 even more starkly prohibits counseling or referring for abortion (except in emergency situations). This is seen clearly in the distinction between "methods" and "services." Petitioners urge that this distinction permits "services," which they interpret to include abortion counseling and referral, but not "methods," i.e., the actual provision of abortion. Brief of Petitioners New York et al. at 12. However, "services" merely means the works performed by one who serves. *Webster's Ninth New Collegiate Dictionary*. One who provides another with methods of birth control is providing services to that person. If a Title X grantee is prohibited from presenting abortion as an acceptable method of birth control, then the grantee is also prohibited from providing any services relating to abortion. Therefore, the distinction is useless in attacking the regulations.

Moreover, when Congress intends to communicate solely the performance of abortion, it speaks expressly, e.g., "the *performance of* any sterilization procedure or abortion." 42 U.S.C §300a-7(b)-(d) (repeated use of these terms) (emphasis added). By selecting the terminology it chose, Congress clearly intended to bar any Title X funds to any entity which would

present abortion as a means to plan the number and spacing of one's children. That intent encompasses an intent to bar counseling and referring for abortion, not just the performance of abortion. Although Congress could have expressly barred "counseling and referring for abortion" in Section 1008, the wisdom of doing so expressly has only been recognized more recently. *See, e.g.* Adolescent Family Life Act, 42 U.S.C.A. §300z-10 (West 1982). However, in the legislation referred to earlier in this paragraph, passed nearer in time to Section 1008, Congress clearly knew how to refer expressly to the actual performance of abortion when it desired to do so. *See* 42 U.S.C. §300a-7 (enacted in 1973, after *Roe v. Wade* had decriminalized abortion).

The "natural construction" of Section 1008 was captured by the Second Circuit in a manner which may scarcely be made more concise or precise:

> Appellants contend that the statute proscribes only the providing for, or the funding of, the performance of abortions and that the Secretary may not prohibit abortion counseling. This is a highly strained construction of Section 1008. A principal function of grantees under Title X is to provide information or 'counseling' as to a range of methods of family planning. A program that counsels use of a particular contraceptive device plainly treats that device as a 'method of family planning.' In this context, it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.' Moreover, when Congress has sought to prohibit the use of federal funds to perform actual abortions, it has used language specifically tailored to that end. *See, e.g.*, Pub. L. No. 100-202, 101 Stat. 1329-99 (1987) ('Hyde Amendment' to appropriations act stating: 'None of the Federal funds provided in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term . . . .'). In the present context, the natural construction of Section 1008 is that the term 'method of family planning' includes counseling concerning abortion.

State of New York v. Sullivan, 889 F.2d 401, 407 (2d Cir 1989).

II. Even if Section 1008 Were Ambiguous, the DHHS Regulations Are Based on a Reasonable Construction of the Statute And There Is No "Clearly Expressed Legislative Intent to the Contrary."

If, as demonstrated in the prior section, Section 1008 may so readily and logically be interpreted to support the new regulations at issue herein, only a very strained reading of the language of Title X could find that Congress intended by this language to expressly *require* the contrary position, i.e, that Congress intended to fund abortion counseling and referral. The most one could reasonably argue is that the language of Section 1008 is ambiguous.[2]

If Section 1008 is ambiguous as to whether it does or does not permit abortion counseling or referral, then a gap exists which the DHHS may fill, as explained by this Court in *Chevron*, 467 U.S. at 843-44 (emphasis added):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary and capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is *implicit* rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.

[2]*See Massachusetts v. Sullivan*, 873 F.2d 1528, 1533 (1st Cir. 1989) ("We find the statutory language inconclusive. The prohibition in section 1008 is phrased broadly and is susceptible of many differing interpretations. . . . We must therefore look beyond the exact wording of section 1008 to assess the meaning of the statute. . . . We find the legislative history inconclusive.") (striking down the new Title X regulations on non-statutory grounds).

Where the legislation delegation is implicit, as in the cases at bar, an interpretation of the agency must be upheld unless it is not reasonable, i.e., it is "arbitrary and capricious," or it is "manifestly contrary to the statute." *Id.* The DHHS regulations are a reasonable interpretation of the statute, as demonstrated above, and are not contrary to Title X and Section 1008. The only remaining way in which these regulations may be attacked is if there exists 'a clearly expressed legislative intention to the contrary.' *Consumer Product Safety Commission*, 447 U.S. at 108.

As demonstrated *infra* no such legislative intention exists. Rather, the legislative history of Section 1008 supports the new regulations. Therefore, the new regulations must be considered within permissible constructions of Section 1008.

A. Whether the Secretary's Interpretation of Section 1008 Is Entitled to Any Degree of Deference Makes No Difference.

Petitioners and amici urge that this Court should give little or no deference to the DHHS interpretation of Title X. Brief of Petitioners Rust et al. at 37-38; Brief Amici Curiae of Schroeder et al. at 7-9, herein. Indeed, the amici urge that "no deference at all" may be proper. Brief Amici Curiae of Schroeder et al. at 9 n.10, herein.[3] However, even if some degree of deference were not appropriate, although deference

[3]This is so, it is argued, because "'the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9). It is, of course, true that this Court is the final authority in interpreting a statute. However, as this Court said in *Chevron*, 467 U.S. at 845,

> Once [a court] determine[s], after its own examination of the legislation, that Congress did not actually have an intent regarding [an aspect dealt with in the regulations], the question before it is not whether in its view the concept is 'inappropriate' in the general design of a program . . . , but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

(footnote continued)

doubtless is proper, this simply means that this Court will more carefully examine the statute for itself to determine whether it permits the regulations promulgated. As demonstrated herein, the statute requires, or at a minimum permits, such regulations, as this Court will find upon close examination. Therefore, this case hinges in no way on the degree of deference to be afforded an agency of the United States.

B. The Secretary's Regulations Are Based Upon a Permissible Construction of Section 1008.

This Court should approve the DHHS regulations because they are reasonable and because there is no clearly expressed congressional intent to the contrary.

1. The DHHS's Interpretation of Section 1008 Furthers the Congressional Intent in Enacting That Provision and Does Not Thwart the Overriding Purpose of Title X.

The Secretary rightly asserts that his pole star must be the intent of Congress in enacting Title X with its prohibitions in Section 1008. To assert, as do Petitioners and some amici, that the DHHS regulations thwart the overriding purpose of Title X, is to say that following the congressional intent (in enacting Section 1008) violates congressional intent (in enacting Title X with its Section 1008 exception). This is nonsensical.

While it is true that Congress intended Title X "to assist in making comprehensive voluntary planning services readily available," Pub. L. No. 91-572, §2(1), 84 Stat. 1504 (1970), it

Footnote 3 continued

Chevron speaks at length about the deference due an Administrator, so that if his " 'choice is a reasonable accommodation of conflicting policies that were committed to the agency's care' " it should be upheld " 'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' " *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

enacted this "comprehensive" bill with an exception—Section 1008—making it somewhat less comprehensive. The key issue, then, is to what extent Section 1008 limited the "comprehensive" nature of Title X. It is unreasonable to continue asserting the comprehensiveness of a statute against a limitation designed to restrict that comprehensiveness. Such an approach would eliminate all exceptions.

Moreover, general remarks—such as those concerning the intended comprehensive nature of a program—are not probative of congressional intent on a narrow issue. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 161-69 (1945). People commonly speak in shorthand expressions in situations where the hearer may be expected to be aware of the commonly-understood, implicit, underlying limitations on what is said. Therefore, the fact that congressional reports and floor speakers speak of Title X as a comprehensive program without always qualifying the statement with the strictures of Section 1008 does not speak to the issue of the scope of Title X.[4] As the Second Circuit succinctly put the matter:

> Whatever force such generalized statements might have in the absence of Section 1008, they do not specifically mention counseling concerning abortion as an intended service of Title X projects, and they surely cannot be read to trump a section of the statute that specifically excludes it.

[4] In the same manner, the statement by the Conference Committee which described Section 1008 as prohibiting "the use of [Title X] funds *for abortion*," H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), J.A. at 70a (emphasis added), is a shorthand expression for abortion-related activity. This is made clear by the statement of Rep. Dingell, discussed *infra*, which made clear that "abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970).

State of New York v. Sullivan, 889 F.2d at 408.

When Congress enacted Title X in 1970, abortion was illegal in most states except under the gravest circumstances.[5] Many states, such as Texas, made exceptions to their abortion prohibition only where the life of the mother was at risk. *Roe v. Wade*, 410 U.S. 113 (1973) (discussing and striking down the Texas statute). Some states had adopted the American Law Institute model statute which allowed for abortion in other grave circumstances, but provided various safeguards, such as the requirement that a review panel approve the performance of an abortion. *Doe v. Bolton*, 410 U.S. 179 (1973) (discussing and striking down the Georgia ALI statute). Opposition to abortion was widespread in 1970 and legislation in most states limited it to a great extent, as evidenced by the fact that when *Roe v. Wade* was decided it swept away the abortion laws of virtually every state.

[5]Rep. Dingell, in House debate, gave a lengthy, eloquent exposition of the evils of abortion, 116 Cong. Rec. 37,375-79, in which he set out the legal, medical, and scientific reasons why abortion was to be condemned and why "the committee members clearly intend[ed] that abortion [wa]s not to encouraged or promoted in any way through [Title X]." *Id.* at 37,375. He noted that abortion was generally illegal in most states and that states experimenting with liberal abortion laws were considering enacting more restrictions on abortion, *id.* at 37,376 n.25. He asserted further, that

> There is a fundamental difference between the prevention of conception and the destruction of developing human life. . . .
>
> If there is any direct relationship between family planning and abortion, it would be this, that properly operated family planning programs should reduce the incidence of abortion. . . .
>
> Furthermore, there is evidence that the prevalence of abortion as a substitute or a *back-up* for contraceptive methods can reduce the effectiveness of family planning programs.

Id. (emphasis added). This final assertion completely deflates any notion that abortion counseling and referral are necessary in Title X programs to provide abortion as a back-up for contraceptive failure. *See, e.g.*, Brief of Petitioner Rust at 44.

Likewise, such opposition existed to abortion in Congress that Title X could not be enacted without Section 1008.[6] Under most state laws, counseling and referring clients for the vast majority of abortions would have been abetment to criminal activity. Congress took special care to avoid this result or the result of preemption of state abortion laws by enacting Section 1008.[7] No evidence exists from this action to support the notion that Congress intended to require or permit abortion counseling, referral, or advocacy in Title X-funded programs.

At the hearings on S. 2108, which became Title X, abortion was mentioned in one way which is significant for determining

[6]In 1970, the term "family planning" did not encompass abortion, which was largely illegal in most places. This is evident from the introductory language of S. 2108, which stated that "family planning has been recognized nationally and internationally as a universal human right." *Family Planning Services: Hearing on S. 2108 [and related bills] Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 39 (1970). While such a statement might be made of contraception after *Griswold v. Connecticut*, 381 U.S. 479 (1965), it could not reasonably be made of abortion prior to *Roe v. Wade*, 410 U.S. 113.

[7]The concern over federal preemption was stated at the time by Congressman Dingell as follows:

> The criminal codes of most states sanction abortion only in certain strict and clearly-circumscribed cases. Even the broadest interpretation of these laws would not lead one to the conclusion that they in any way allow for such a procedure as an accepted method of family planning. For the Congress of the United States to appropriate funds for a procedure which would violate the criminal law of a vast majority of American jurisdictions would be to raise constitutional questions of a most serious nature.

116 Cong. Rec. 37379 (remarks of Rep. Dingell). This concern with federal preemption is far from past. As this Court returns to the states more legislative control over abortion, a process evident in the most recent abortion cases, *see* Brief Amici Curiae of the National Right to Life Committee, Inc. in Support of Respondent, herein, abortion on demand will no longer be the law of the land. Concerns over preemption or funding the abetment of criminal activity will once again come to the fore, just as they concerned Congress prior to *Roe v. Wade*.

congressional intent.[8] A number of persons made strong arguments that adoption of Title X would have the effect of reducing the incidence of abortions. Most notable of these witnesses was Dr. Alan Guttmacher, representing Planned Parenthood, who repeatedly argued that adoption of the Act would reduce both legal and illegal abortions. *Family Planning and Population Research 1970: Hearings on S. 2108 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2nd Sess. 65, 68, 78 (1970) (statement of Dr. Alan Guttmacher of Planned Parenthood); *cf. id.* at 99 (statement of Mr. Carl Flemister, representing Citizens Committee for Children as well as Planned Parenthood of New York City). From the prevalent and forceful assertion of this argument, it is evident that the supporters and advocates of Title X saw it as the legislation that would best reduce abortions by substituting preventive methods of family planning.

The argument that the incidence of abortion would be reduced by continued funding of Title X has been asserted repeatedly in legislative deliberations leading to the passage of Title X. This argument, influential in the minds of those voting for Title X, is inconsistent with any intent to allow abortion counseling and referral, which would have the effect of increasing, not decreasing, the incidence of abortion.

Congress also intended to keep pregnancy prevention strictly separated from pregnancy termination in Title X programs. As already discussed, one of the major arguments

[8]While statements of individuals testifying at hearings are not as weighty in establishing legislative intent as, for example, the statements of a bill's prime sponsor or a committee report, where a clear pattern of emphasis is evident, such statements should be given some weight. "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 2 Cranch 358, 386 (1805). Such a clear pattern of emphasis is set forth in the text, namely, that Title X was presented to Congress as a vehicle for diminishing the number of abortions by promoting preventive birth control measures which would prevent conception.

employed in the campaign for passage of Title X was that it would reduce the incidence of abortion. Thus, the two were seen as separate and distinct. The 1970 report of the conference committee on Title X declared:

> It is, and has been, the intent of both Houses that funds authorized under this legislation be used only to support *preventive* family planning services, population research, infertility services and other *related* medical, informational, and educational activities.

H.R. Conf. Rep. No. 1667, 91st Cong., 2nd Sess. 8-9 (1970) (emphasis added).

As abortion is not a "preventive" family planning measure, it was not to be included within the scope of Title X. Moreover, the other services to be offered were to be "related" to "preventive family planning services, population research, [and] infertility services." By the usual canons of grammar and statutory construction, the term "related" is governed by the term "preventive," which modifies the subsequent terms in the sentence. Thus, abortion counseling and referral for abortion are not permissible under the provision of Title X as "related medical, informational, and educational activities" because they do not relate to preventive family planning.

That the promotion of abortion and the promotion of preventive family planning were to be kept strictly separated in the Title X program is also evident in the House committee hearings on Title X. The members of the committee were adamant in their insistence that Title X had nothing to do with abortion.[9] Subcommittee member, Congressman Preyer stated the matter thus:

[9]*See, e.g., Family Planning Services: Hearing on S. 2108 [and related bills] Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 2d Sess. 245-46 (1970) (testimony of Mrs. David R. Mogilka and responses by Rep. Carter):

REP. CARTER: Now to relieve your mind further about abortions and

(footnote continued)

> [Y]ou mentioned the idea of abortion . . . and I certainly agree with you . . . and am against easy abortion and would only accept it in a very extreme and rare case. But is there anything in this bill that says anything about abortion?

Family Planning Services: Hearings on S. 2108 [and related bills] Before the Subcomm. on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2nd Sess. 321-22 (1970) (response of Congressman Preyer to testimony of Msgr. Alphonse S. Popek).

In the same exchange, Congressman Preyer expressly addressed abortion counseling. Responding to the concern of a witness that a social worker counseling on contraception might easily slip into counseling on abortion, Representative Rich-

Footnote 9 continued

> so on, we certainly don't mean for this bill to cover those widespread things. . . .
>
> Personally, I am opposed to abortions except in such cases as might endanger the life of the mother or in case of incest or rape, and personally I would not support any bill that does advocate all these things which you have mentioned.
>
> . . . .
>
> MRS. MOGILKA: Would you feel that if the Planned Parenthood Association is one of the private organizations given grants and funding under this bill, they should implement their program of abortion. . . . Or would you feel you would then bar them from proceeding with abortion. . . .
>
> REP. CARTER: . . . I don't believe this bill covers abortions at all.

Also noteworthy in this colloquy is the interwoven theme of voluntariness. That a subcommittee member could represent that Title X had nothing to do with abortion and yet retains its voluntary nature, *id.*, disproves any assertion that the voluntariness requirement of Title X requires abortion counseling. *See, e.g.*, Brief Amici Curiae of Schroeder et al. at 13, herein. The emphasis on voluntariness, in the context of the legislative history, is that no one shall be forced to have an abortion, be sterilized, or use contraception.

The same may be said of the emphasis on allowing people to do what their conscience dictates. *Id.*; 116 Cong. Rec. 37,382 (1970) (statement of Rep. Rogers). This in no way implies an approval of abortion counseling or referral, for the legislative history reveals that the issues of sterilization and contraception were also matters of conscience for many and were the true focus of the debate relating to conscience.

ardson Preyer declared that such abortion counseling would be an "abuse" of the law. *Id.* at 321.[10]

Representative Dingell, the author of section 1008, before the full House, which was considering Title X, declared that the intent was more than a mere ban on the performance of abortions. He stated: "With the 'prohibition of abortion' amendment—Title X, section 1008—the committee members clearly intend that abortion is *not to be encouraged or promoted in any way* through this legislation." 116 Cong. Rec. 37375 (emphasis added).[11] Thus, the intent was much broader than a mere bar to the performance of abortions. Clearly, abortion counseling and referral for abortion constitute encouragement or promotion of abortion, which is prohibited by the congressional intent in enacting section 1008.

In fact, the legislative history of Section 1008 clearly supports the notion that abortion counseling and referral are proscribed in Title X programs. This is evident from the Senate Report which indicated that a "successful family planning pro-

[10]Certain amici omit this response, declaring that "Subcommittee testimony by Monsignor Alphonse S. Popek, inveighing against abortion and abortion counseling, does not shed any light on the meaning of Section 1008." Brief Amici Curiae of Schroeder et al. at 12 n.13. herein.

[11]That Rep. Dingell now wishes to restate his statement, Comments of Chairman John D. Dingell, Committee on Energy & Commerce, on Proposed Rules 42 CFR Part 59—Fed. Reg. Notice, Sept. 1, 1987 (Oct. 14, 1987) at 2, in no way affects the force of his original statement in interpreting the legislative intent underlying Section 1008. It is the nature of the legislative process that legislators are affected in voting by what they hear prior to the vote and not by what a speaker says twenty years later that he intended to say. Moreover, because Rep. Dingell's apparent change in attitude was affected by the decriminalizing action of *Roe v. Wade* on state abortion laws, any reliance on his current statements must be tempered by the actions of this Court in altering the reach of *Roe v. Wade*.

Because of this fact, reliance on the current legality of abortion on demand is somewhat temporary. Thus, when amici urge that "[t]here is no support for reading into [Rep. Dingell's] statement an otherwise unstated intent to preclude referral to other health care providers that *could legally perform abortions in their state*," they state a transitory situation. Brief Amici Curiae of Schroeder et. al. at 12, herein (emphasis added).

gram" should provide "consultation" and "referral to other medical services as needed." S. Rep. No. 1004, 91st Cong., 2d Sess. 10 (1970). It was in the context of such a program, that we must read Section 1008. Because Title X was to be a program featuring consultation and referral, and not just performing (or funding) various procedures, the bar on funding programs presenting abortion as a means of controlling the number and spacing of one's children must logically extend to such consultation and referrals.

2. It Is Sufficient That DHHS's Regulations Are Consistent with the Legislative Intent Underlying Section 1008; They Need Not Totally Comport With Prior Regulations.

The fact that the new DHHS regulations differ in some respects from those preceding them is evident, otherwise this case would not exist. However, this does not affect the validity of the regulations at issue. *Cf.* Brief Amici Curiae of Schroeder et al. at 13, herein.

The fact that there were prior, different regulations does not preclude an agency from changing policies "after reasoned consideration of relevant factors." *Western Union Int., Inc. v. FCC*, 804 F.2d 1280, 1291 (D.C. Cir. 1986); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting) (a change in administration is a reasonable basis for reevaluation of prior agency policy). What the DHHS must comply with is the intent of Congress, not the policy choices of a predecessor administration.

3. The Congressional Intent Expressed in Subsequent Legislative History Regarding Title X, Although Less Controlling, Continues to Exclude Abortion Counseling and Referral for Abortion Within Title X Programs.

Critics of the new Title X rules have relied upon certain recent developments as indicating a changed legislative intent.

This reliance is misplaced in two ways. First, subsequent legislative history is of limited value in determining the legislative intent of passages, such as Section 1008, which remain unchanged by Congress and have clear prior legislative histories. Second, the recent events do not indicate what these critics claim they do. The failure of a legislature to act is not a sure indicator of approval of a policy in place, and this Court has expressed reluctance to draw such an inference.[12]

a. Congress Has Been Largely Unaware of the Department's Interpretation of the Statute.

Caution in reading congressional approval of the former Title X rules, promulgated in 1981, or of earlier advisory opinions by the DHHS Office of General Counsel (OGC) as congressional acquiescence on the matter is especially important in the present case. As noted in the Preamble to the new Title X regulations, even such a prominent leader in the 1978 Title X debates as Congressman Harold Rogers seemed unaware of the OGC advisory opinions, which allowed activity not having the principal purpose or effect of promoting abortion. 53 Fed. Reg. 2923 (1988). Such lack of awareness of what the DHHS had allowed must have been widespread if Congressman Rogers was unaware of the interpretation given to section 1008 by the OGC.

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[12] *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, 463 U.S. 29 (1983). Even statements made during oversight hearings are accorded little weight in interpreting previously enacted legislation. *Regional Railroad Association Act Cases*, 419 U.S. 102, 132 (1974); *see Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 and 209 (1978) (Powell, J., dissenting). And where Congress has published a committee report, after enactment of legislation, which interprets that legislation, the Supreme Court has refused to give it much weight. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980) ("subsequent legislative history will rarely override a reasonable interpretation of statute that can be gleaned from its language and legislative history prior to its enactment"). In the limited circumstances where the Court has relied on post-enactment expressions, the Court has done so cautiously and selectively. *See, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

Representative Rogers' statements are especially significant, because he presided over the oversight subcommittee and its hearings on Title X, from its inception in 1969 until the end of the 95th Congress in 1978, when he retired. He categorically rejected the notion that Title X funds could be used for abortion counseling and referral. In 1975, he wrote a letter, which was made a part of his subcommittee's record, declaring that Title X's strictures would "prohibit the support of any program in which abortion counseling or abortion referral services are offered." *Comments of the Honorable Paul G. Rogers on the Statement of the United States Coalition for Life: Hearings on H.R. 2954 and 2955 Before the Subcomm. on Public Health and Environment of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 260 (1975); 124 Cong. Rec. 37046 (1978) (quotation of the passage by Rep. Dornan).

In 1978, Title X was again due to be extended. However, a number of pro-life legislators were concerned with recent allegations that Title X funds were being used in programs employing abortion counseling and referral. In House floor debate, Congressman Robert Dornan offered a series of amendments to curb the perceived abuses of Title X. 124 Cong. Rec. 37045-47. One would have "enabled groups which specialize in alternatives to abortion to receive Title X funding." *Id.* at 37045. They would have been allowed to do so without being required to "counsel abortion," as required by "[the Department of Health Education and Welfare (HEW)] . . . as an eligibility precondition to title X grants or contracts." *Id.* The response of Chairman Rogers, floor manager of the Title X reauthorization that year, was that pregnancy counseling of any kind was forbidden under Title X, even counseling of pregnant women which was designed to discourage abortion. *Id.* He declared that allowing the counseling of pregnant women "would simply change the whole concept of family planning." *Id.* He insisted that "[f]amily planning occurs before pregnancy." *Id.* He saw nothing wrong with setting up a program of counseling for pregnant women, but opposed the amendment, because "the need is too great for family planning

before pregnancy." *Id.* That, he insisted, was what Title X was about "to prevent the need for abortion." *Id.*

Dornan offered another amendment barring any "entity which directly or indirectly provides abortion, abortion counseling, or an abortion referral services [sic]." *Id.* He observed that this amendment would "reinforce the assurances . . . already given us, namely, that none of the money under . . . title X . . . will be used . . . for abortion, abortion counseling, or abortion referral in any way whatever." *Id.* at 37046. He cited a letter from HEW, Office of the General Counsel, dated 1974, which declared it the policy of HEW that Title X funds "may not be expended to perform, encourage, or promote abortions." *Id.* However, he observed that recent reports indicated that 117 Title X recipients were counseling and referring for abortion with federal funds. *Id.* He noted that such activity was forbidden under the Dingell amendment, section 1008, and an earlier statement by Congressman Rogers, that counseling and referral for abortion were forbidden under Title X. *Id.*

Congressman Rogers opposed the amendment, because it was an "unneeded amendment." *Id.* It was unneeded because, as he declared:

> Abortion is not a method of family planning. Abortion comes after pregnancy—after pregnancy. And the gentleman misses the point of what we are doing in Title X. It is before—before. It is to let people know how to avoid pregnancy. *Id.*

He reiterated his point that "[t]he amendment is not needed." Congressman Dornan rejoined, "What about the 117 organizations at a minimum that are abusing these funds?" *Id.* Congressman Rogers declared that it was "simply not done. It is not permitted under the law." *Id.*

The legislative history reveals strong argument by the chairman of the oversight subcommittee against the Dornan amendment, barring abortion counseling and referral, as "not needed," both because existing law proscribed such activity,

and because, in Congressman Rogers' belief, the alleged abuses were not occurring. It also reveals no knowledge of any interpretation on the part of HEW which would allow abortion counseling and referral, but rather indicated a belief that HEW proscribed abortion counseling and referral. The legislative history also reveals an understanding that counseling of any kind for pregnant women was beyond the scope of Title X. These were the arguments before the House when it voted down the Dornan amendments. No arguments that abortion counseling or referral for abortion should be included in Title X programs appear in the record. Thus, this legislative history reveals the common belief in Congress that abortion counseling and referral were not within the purview of Title X.

The evidence that Congress—and often even DHHS administrators—were unaware of the prior policy of permitting abortion counseling and referral is powerful.

In 1984, DHHS Secretary Heckler declared her belief that Title X prohibited "abortion advice, counseling, or involvement." *Health and the Environment Miscellaneous—Part 3: Hearings on Reauthorization of Title X Before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 465 (1984) (statement of Margaret Heckler, Secretary, DHHS). She also stated that Title X clinics were complying with Title X's prohibitions against abortion.

Also in 1984, DHHS Assistant Secretary for Health Brandt and Deputy Assistant Secretary for Population Affairs Mecklenberg were totally unaware that DHHS had a policy allowing abortion counseling and referral, as indicated in the following colloquy before a Senate subcommittee:

> SEN. DENTON: . . . Dr. Brandt, I am going to read the list of activities related to abortions, and ask you to tell me whether or not each one of them is allowable under the title X program. . . . .
>
> First, for the activity to provide information about abortion services.
>
> MRS. MECKLENBURG: No.

Reauthorization of Family Planning Programs, Title X of the Public Health Serv. Act, 1984: Hearing Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2d Sess. 53 (1984).

Senator Denton later returned to this issue:

> SENATOR DENTON: The first question we asked, which Mrs. Mecklenburg answered, I maintain was answered incorrectly. The question was, Can the activity provide information about abortion services, and she said, "No," and to my knowledge, the answer to that question is "Yes."
>
> DR. BRANDT: Well, they cannot do it in the conduct of the family planning clinic services that they are providing with Federal funds.

Id.

In 1989, Dr. Mason, DHHS Assistant Secretary for Health was questioned concerning comments made in 1984 by Secretary Heckler that "the Inspector General of HHS had determined that 'the prohibition against abortion was well-known at the level of the family planning clinics, and it was being honored.'" He was asked if he still agreed with that assessment. He responded that he did. *Federal Family Planning Program Reauthorization: Hearing on H.R. 930 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 28 (1989). Shortly thereafter, however, he was asked by Congressman Bliley whether, "in her 1984 testimony, . . . Secretary Heckler realize[d] that title X projects were being required to counsel and refer on abortions?" *Id.* at 31. Dr. Mason referred the question to Nabers Cabaniss, Deputy Assistant Secretary for Population Affairs, for a response, because he had not been at DHHS in 1984. Ms. Cabaniss replied, "I believe that Mrs. Heckler stated when she came before the subcommittee at that

time that abortion counseling was prohibited in title X. So she was not aware that HHS had guidelines in effect which required abortion counseling." *Id.*

If key congressional leaders, such as Rep. Rogers, and officials of DHHS, such as Secretary Heckler, were unaware that DHHS had a former policy of allowing abortion counseling and referral, it is doubtful that Congress in general knew and acquiesced in such a policy.

The present political reality is that, since the Public Health Service guidelines mandating abortion referral became highly visible, neither the chairman of the oversight subcommittee in the House nor the chairman of the oversight committee in the Senate has been able to move a reauthorization bill for Title X through Congress. Sponsors have been unwilling to open their bills to strengthening amendments on the abortion issue and unable to obtain the necessary two-thirds vote, under suspension of the rules, to win passage without opening the bills to amendments. In fact, in 1985, such a reauthorization attempt was made and voted down, winning a majority but failing to achieve the needed two-thirds vote. 131 Cong. Rec. H4364-5 (daily ed. June 18, 1985).

Thus, to argue that congressional inaction on Title X indicates approval of prior guidelines or interpretations is erroneous. Any subsequent expressions by members or committees of Congress should not be weighed too heavily in determining the congressional intent behind provisions that remain in effect, unchanged from their original form of enactment, with a clear legislative history.

b. Congress Has Never Reenacted Title X and Congressional Reauthorization of Title X and Continuing Resolutions Do Not Indicate Congressional Acquiescence.

Because Congress has neither reenacted Title X nor amended Section 1008, the only formal legislative action by

Congress was the original enactment of these provisions. Reauthorization of the spending resolution does not amend, repeal, or otherwise affect previously enacted substantive law. *Cf. TVA v. Hill*, 437 U.S. 153, 190-93 (1978). Therefore, these later actions do not affect the intent underlying Section 1008. However, certain actions are instructive of the ongoing congressional attitude.

Funding for Title X was due to expire on June 30, 1973, six months after *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), made abortion legal. The issue of funding abortions, or abortion counseling or referral, did not come up during the reauthorization deliberations, indicating that Congress felt it unnecessary to amend section 1008 in light of *Roe*. A central argument continued to be that Title X was preventive in nature and would decrease abortions.[13] As noted above, this is difficult to square with government-funded abortion counseling and referral. As noted in the preceding subsection, Congress was unaware of the existence of abortion counseling and referral policies in Title X programs and so could not acquiesce in any such DHHS policy.

c. The Failure of Congress to Enact Legislation More Expressly Imposing the Restrictions of the DHHS Regulations Is Due to Ignorance of DHHS Practices and Political Deadlock.

The fact that Congress failed to enact amendments which

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[13] *Health Programs Extension Act of 1973: Hearings on H.R. 5608 and S. 1136 Before the Subcomm. on Public Health and Environment of the House Committee on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess. 119 (1973) (testimony of Mr. Russell Richardson, Director of the Georgia Governor's Council on Family Planning) and 174 (testimony of Mr. Frederick Jaffe, Vice President of Planned Parenthood Federation of America); *Family Planning Services and Population Research Amendments of 1973: Hearings on S. 1708 Before the Special Subcomm. on Human Resources of the Senate Committee on Labor and Public Welfare*, 93rd Cong., 1st Sess. 142 (1973) (testimony of Dr. Thomas L. Hall of the American Public Health Association) and 172 (testimony of Dr. Louise B. Tyrer of the American College of Obstetricians and Gynecologists).

would have legislatively expressly prohibited abortion counseling and referral says nothing to the congressional intent underlying Section 1008. *Cf.* Brief Amici Curiae of Schroeder et al. at 19, herein. As noted above, subsequent legislative history is particularly suspect where no amendment to the original enactment results. Moreover, as noted at length above, the reason these amendments did not pass was because they were believed unnecessary. *See supra*, II(B)(3)(a).

It has been contended that the 1987 statement of certain current members of the House oversight subcommittee, such as Congressman Henry Waxman, and of certain members of the Senate indicates the controlling congressional intent. In response to a threatened cutoff of funds for Planned Parenthood, these members of Congress declared that Congress had "reexamined the program several times since [1970] and reauthorized it without significant change." 133 Cong. Rec. E779 (daily ed. March 5, 1987). The views of these members of Congress were substantially incorporated in a provision of Sen. Lowell Weicker, inserted in committee in H.R. 3058, which was the 1988 appropriations bill for the DHSS. 133 Cong. Rec. S14253 (daily ed. Oct. 14, 1987); *see*, S. Rept. No. 189, 100th Cong., 1st Sess. 193 (1987). It provided that funds for Title X could only be expended under the regulations and guidelines then in effect, precluding funding under the proposed rules, which have become the new rules at issue in this case.

This event is of special importance in determining the current attitude of Congress. The proposed rules, now at issue in this case, were published while Congress was in session. Congress had the benefit of being advised of them, through the promotional efforts of Congressman Waxman, Senator Weicker, and their colleagues in the effort to reject the new rules. If Congress believed that the new rules promulgated by the DHHS were outside the scope of its intent for Title X, it had the perfect vehicle before it, in the form of the Weicker amendment, to reject the proposed regulations. However, it did not do so. Rather, Congress rejected the Weicker amendment, by

adopting the conference committee report, which deleted the provision. H.R. Conf. Rep. No. 498, 100th Cong., 2nd Sess. 943 (1988) (H.R.J.Res. 395).

Thus, the Weicker amendment represented the views of only certain members of Congress, and not the intent of Congress. The statements of members of Congress, which are rejected by the Congress as a whole, are of no value in determining the intent of Congress.

III. The DHHS Requirement of Physical Separation of Title X-Funded Programs from Programs Offering Abortion-Related Services Is In Keeping With Congressional Intent and Responsive to an Existing Problem.

As fully developed above, Congress intended by Section 1008 to completely separate Title X-funded, preventive family planning programs from programs of grantees which engage in abortion-related activity. Both Section 1008 and the Conference Report on Title X indicate that there must be separation between *programs* conducted by a grantee, not just separate bookkeeping entries. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9 (1970). While the Conference Report indicates that Title X is not intended to interfere with or limit [non-Title X] *programs* conducted by Title X grantees, this statement cannot properly be stretched to allow commingling of Title X services with abortion-related activity which is specifically proscribed by Section 1008. To do otherwise would allow the tail to wag the dog, i.e., local grantees rather than Congress would control the way federal money is expended. No generalized language about integration of program with existing programs can stretch Title X beyond the limit on this integration imposed by Section 1008.

Moreover, one of the problems specifically identified by the GAO report of 1982 was that members of the public could (and some did) believe that the Federal government was providing abortion services. General Accounting Office, *Restrictions on*

Abortion and Lobbying Activities in Family Planning Program Need Clarification (1982). This provides a solid justification for the requirement of physical separation sufficient to inform the public that the Federal government is not funding abortion services.

Two important considerations need to be emphasized regarding the separation requirement. First, there is a grant appeals procedure which safeguards grantees against easy termination. 42 CFR 50.404(a); 42 CFR 50.406.

Second, the limited nature of the impact on Title X grantees is expressed by DHHS Deputy Assistant Secretary for Population Affairs Nabers Cabaniss:

> [A]n assumption of compliance is reasonable based on our knowledge of the Title X program as a whole, as the majority of our clinic sites typically do not provide abortions and in which the overall level of involvement in activities such as abortion counseling is not extensive. We also think that many, if not most, of the Title X sites in hospitals may be sufficiently separate to meet the requirements of section 59.9.

Memorandum from Nabers Cabaniss, Deputy Ass't Sec. for Pop. Affairs, to Regional Health Admin'rs (Dec. 8, 1987). Allegations of major upheaval in Title X programs are clearly overblown. In any event, where Congress has declared that Title X programs must keep preventive family planning (permitted in Title X) separate from abortion-related activity (not permitted in Title X), as it did in Section 1008, the will of Congress should be followed.

Finally, Petitioners also seek to expand the amount of funds they claim should be theirs to spend without any Title X restriction. For example, Petitioners Rust et al. argue that patient charges or reimbursement for Title X-funded services should not be governed by Title X rules. Brief of Petitioners Rust et al. at 25 & n.43. This error was also made by the First Circuit, in its opinion on Title X, *Massachusetts v. Secretary of*

Health and Human Serv., 873 F.2d 1528, 1530, 1531 (1st Cir. 1989), which referred to such income as "private[]" funding and "recipient generated income."

The error here is the failure to make the distinction between "private funds" and "program income," which is a distinction found within Department-wide and government-wide public administration statutes, policies, and procedures. *See generally* B. Cappalli, *Federal Grants and Cooperative Agreements* §§1:29, 5:23, 5:24, 5:25, 10:09, 11:01 (1983). Program income is defined as "gross income earned by the grantee from grant-supported activities." *Id.* at §5:24 (quoting OMB definition); 45 CFR 74.42. Thus, any fees paid by clients for Title X-funded services are properly considered public funds subject to Title X grant restrictions. Therefore, Petitioners overreach when they claim that program income, such as client fees generated by Title X services, should not be subject to the restrictions of Title X.

CONCLUSION

For the foregoing reasons, your amici urge that the judgment of the Court of Appeals be affirmed.

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